

N.D.A.G. Letter to Wild (Oct. 1, 1986)

October 1, 1986

Mr. Steven J. Wild
Bowman County State's Attorney
P.O. Box 260
Bowman, ND 58623

Dear Mr. Wild:

Thank you for your letter of September 16, 1986, inquiring as to whether a nonresident attorney may be appointed by the county commission to fill a vacancy in the state's attorney's office or must the appointment come from the Attorney General's office.

In 1981 N.D. Op. Att'y Gen. 17 (Attorney General's Opinion 81-7), this office concluded that a board of county commissioners may not appoint an attorney who is not a qualified elector of that county to act as that county's state's attorney. With this particular conclusion, I am in agreement on the basis of N.D.C.C. §11-10-04. This statute states that a county officer must be a qualified elector in the county in which he is chosen or appointed.

This statute, however, does provide for exceptions to this requirement when otherwise provided by law. In the 1981 Attorney General's opinion, such an exception was located in N.D.C.C. §11-08-10. This statute allows the board of county commissioners to appoint officers of adjoining counties to act as officers of its own county for a term up to two years until such time as a successor is appointed and qualified. However, this statute is found within N.D.C.C. Ch. 11-08 which discusses the consolidated office form of county government. Although the 1981 opinion does not restrict the scope of N.D.C.C. §11-08-10 to counties utilizing the consolidated office form of government, I believe that such a restriction must occur. This statute cannot be taken out of context and applied to all counties regardless of the form of government it utilizes.

Therefore, the 1981 Attorney General's opinion is correct in concluding that the board of county commissioners cannot appoint an attorney who is not a qualified elector of that county to act as the county's state's attorney. The 1981 opinion's conclusion that an adjoining county state's attorney may be so appointed as a county state's attorney for up to two years and until a successor is appointed and qualified is restricted to a county utilizing a consolidated office form of government. Otherwise, the state's attorneys of adjoining counties may not be so appointed in counties not utilizing this unique form of government.

Your letter inquires as to whether an appointment may come from the Attorney General's office where a county does not have a licensed attorney able or willing to serve as the county state's attorney or to fill a vacancy in that office. In the past, this office has provided

appointments to attorneys as special assistant attorneys general for the purpose of performing those duties required of a county state's attorney. These appointments have been rendered at the request of the appropriate board of county commissioners upon a showing that a vacancy exists within the state's attorney's office and that a licensed attorney, who is a qualified elector of that county, is not available for appointment to fill the unexpired term of that vacancy.

This option is indeed available to the Slope County Board of County Commissioners should a vacancy exist within the Office of Slope County State's Attorney and a licensed attorney, who is a qualified elector of that county, does not exist who is able to be appointed to fill the unexpired term of that office. However, the determination of which attorney should receive such an appointment is based upon the recommendation of the board of county commissioners.

Sincerely,

Nicholas J. Spaeth

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